UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEGAL AID OF THE BLUEGRASS, INC.

Employer,

and **Case 09-RC-254679**

NATIONAL ORGANIZATION OF LEGAL SERVICE WORKERS/UAW LOCAL 2320,

Petitioner.

EMPLOYER LEGAL AID OF THE BLUEGRASS, INC.'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND ORDER ON CHALLENGED BALLOTS

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I. INTRODUCTION

The Employer, Legal Aid of the Bluegrass, Inc. ("Legal Aid" or the "Employer") hereby requests review of the Regional Director's Decision and Order on Challenged Ballots ("Decision") rendered by the Acting Regional Director of Region 9, Patricia K. Nachand, on May 1, 2020. Pursuant to the National Labor Relations Board's ("the Board") Rules and Regulations Section 102.69(d), the Employer requests this review on the following grounds:

1. There is a substantial question of law or policy raised because of the departure from officially reported Board precedent; and
2. The Regional Director's decision is substantially based on clearly erroneously factual assumptions, which prejudicially affect the Employer.

II. PROCEDURAL HISTORY

On January 16, 2020, the National Organization of Legal Services Workers/UAW Local 2320 (hereafter "the Union") filed a petition to represent employees at the Employer's Covington, Kentucky office.[1] On February 4, 2020, Legal Aid filed its *Excelsior* list with the Region of all of the eligible employees, which did not include Sarah Lowe or Tiffany Williamson-Coleman.[2]

On February 12, 2020, Region 9 held an election at the Employer's office, and two groups of employees voted whether or not they wanted to be represented by the Union. The first group was a group of professional employees defined as:

[1] The Union sought an *Armour-Globe* election for the proposed Covington, Kentucky bargaining unit to be represented along with the existing unit at the Employer's Ashland and Morehead locations. The Employer also has a Lexington, Kentucky location, which is non-unionized and was not included in the petitioned unit.

[2] Legal Aid's counsel confirmed with the Board Agent that the parties "never agreed [Sarah Lowe] or [the social worker] designation was in the voting unit….we agreed to disagree and she can be voted under challenge. There has never been a social worker in the unit." *See* Exhibit 2.

> All full-time and regular part-time professional employees employed by the Employer at its Covington, Kentucky location, including attorneys, but excluding all non-professional employees, unit managers, managing attorneys, law clerks, office managers, guards and all supervisors as defined by the National Labor Relations Act.

The professional employees voted three to one to be included with the nonprofessional employees (with one challenged ballot). Consequently, the professional employees' ballots were comingled with the second group of employees defined as:

> All full-time and regular part-time non-professional employees employed by the Employer at its Covington, Kentucky location, including paralegals, support staff, and all other permanent and temporary employees whose term of employment is to exceed one year in length, but excluding attorneys, professional employees, unit managers, managing attorneys, law clerks, office managers, guards and all supervisors as defined by the National Labor Relations Act.

Once the ballots were comingled, the combined vote was four votes in favor representation by the Union, and five votes against representation by the Union. There were also two challenged ballots which were not on the voter list: Ms. Williamson-Coleman and Ms. Lowe.

On February 12, 2020, the Region instructed the parties to provide evidence in support of their position with respect to each challenged voter. On February 27, 2020, the Region issued a notice of hearing. On March 6, 2020, Hearing Officer Jonathan Duffey presided over the hearing at Region 9's offices in Cincinnati, Ohio.[3] On March 20, 2020, Hearing Officer Duffey issued a Report on Challenged Ballots overruling the Employer's objections to Ms. Williamson-Coleman and Ms. Lowe's ballots. Similarly, on May 1, 2020, the Regional Director issued a

[3] References to the Exhibits of Employer, the Union, and the National Labor Relations Board are designated as "E-#," "U-#," and "Board-#" respectively, with the corresponding number for the exhibit. References to the transcript are designated as "Tr. #," with the corresponding page number. References to the Regional Director's Decision and Order on Challenged Ballots will be designated as "Decision" with the corresponding page number.

Decision and Order overruling the challenges to the ballots of Ms. Coleman and Ms. Lowe, directing their ballots to be opened and counted, and a revised Tally of Ballots to issue.

III. ISSUES PRESENTED

Pursuant to Section 102.67(e) of the Board's Rules and Regulations, the Employer respectfully requests the Board accept review of the following issues:

1. Whether the Regional Director incorrectly concluded that Sarah Lowe was a non-professional employee?

2. Whether the Regional Director misapplied the framework under *Caesars Tahoe*, 337 NLRB 1096, 1097 (2002) for analyzing stipulated bargaining units?

3. Whether the Regional Director misapplied the framework under *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), and failed to consider all of the relevant evidence in the record?

4. Whether the Regional Director failed to properly consider the impact of an employee's funding, and continued employment when analyzing the community of interest standard?

5. Whether the Regional Director incorrectly concluded that Sarah Lowe shares a community of interest with the proposed bargaining unit?

6. Whether the Regional Director incorrectly concluded Sarah Lowe's exclusion from the bargaining unit would result in her being the sole non-represented employee employed by the Employer when the Employer has employees in the Covington office that are not represented and another office of non-represented employees?

7. Whether the Regional Director incorrectly overruled the Employer's objection to Sarah Lowe's ballot, and included her in the proposed bargaining unit?

8. Whether the Regional Director incorrectly concluded that Tiffany Williamson-Coleman was an employee under Section 2(2) of the Act?

9. Whether the Regional Director incorrectly concluded that Tiffany Williamson-Coleman left her management position by relying exclusively on her testimony when she was an unreliable and inconsistent witness?

10. Whether the Regional Director incorrectly concluded performance appraisals were insufficient to establish supervisory status under Section 2(11) of the Act?

11. Whether the Regional Director incorrectly concluded Tiffany Williamson-Coleman was a credible witness when her testimony was rebutted by objective documents and consistent witness testimony?

12. Whether the Regional Director incorrectly overruled the Employer's objection to Tiffany Williamson-Coleman's ballot, and included her in the proposed bargaining unit?

13. Whether the Regional Director properly concluded that the ballots of Sarah Lowe and Tiffany Williamson-Coleman should be opened and a revised tally of ballots should issue?

IV. SUMMARY OF ARGUMENT

The Regional Director ignored Board precedent and the evidence presented on the record in order to support the reasoning in a flawed Hearing Officer's Report on Challenged Ballots. The Regional Director improperly analyzed the proposed stipulated bargaining unit, and Sarah Lowe's duties and responsibilities in order to determine that she should be included in the proposed bargaining unit. Ms. Lowe is the only social worker in the entire organization, and she operates independently and with an entirely different population not served by the rest of the organization. Critically, Ms. Lowe's position and funding is entirely dependent on a grant from the Department of Justice for Legal Aid to start a novel program which has no guarantee of being continued or renewed. By virtue of her funding, Ms. Lowe is the only employee in the entire organization that is not subject to the rigorous requirements policing legal service corporations (LSCs) outlined in the Code of Federal Regulations. As a result of her unique position and funding, Ms. Lowe does not share a community of interest with the rest of the proposed bargaining unit.

Significantly, the Regional Director refused to analyze whether Ms. Lowe shares a community of interest with the proposed bargaining unit because in the Regional Director's view, if she were not included in the bargaining unit, Ms. Lowe would be "the sole non-

represented employee employed by the Employer, a residual unit of one with no opportunity for collective bargaining." The Regional Director's determination is demonstrably false. The Employer employs other employees with defined or possibly shortened tenures such as contract attorneys and law clerks. The Employer also has an entire office of non-unionized employees, where Ms. Lowe's supervisor is located, and with whom she shares a stronger argument for a community of interest.

Additionally, the Regional Director impermissibly relied on unsubstantiated testimony, which was directly rebutted by clear testimony from two witnesses and objective documents, to demonstrate that Ms. Williamson-Coleman left her supervisory position. Ms. Williamson-Coleman never left her supervisory position; instead, the Employer accommodated her personal and medical issues and attempted to lighten her workload. Ms. Williamson-Coleman admitted that she has never ceased performing the essential functions of her job, and that there is no one else in that position.

Thus, for the reasons more fully set forth below, the Regional Director's Decision and Order on Challenged Ballots should be rejected. The Board should sustain the challenges to the ballots of Tiffany Williamson-Coleman and Sarah Lowe, and certify the results of the election.

V. ARGUMENT

A. The Regional Director Erred in Her Decision to Include Sarah Lowe in the Unit.

The Regional Director failed to properly apply the three pronged test under *Caesars Tahoe* to analyze the stipulated bargaining agreement. Under *Caesars Tahoe*, the Board applies a three-prong test to resolve challenged ballots involving stipulated bargaining units: 1) the Board analyzes the language of the stipulated bargaining unit to determine whether it expresses the objective intent of the parties in clear and unambiguous terms; 2) if the language is

ambiguous, the Board examines the parties' intent through normal methods of contract interpretation, including an examination of extrinsic evidence; and 3) if the language is still ambiguous, the Board applies the community of interest standard. *Caesars Tahoe*, 337 NLRB 1096, 1097 (2002).

i. The Stipulated Bargaining Unit Does Not Include a Social Worker Classification.

The Regional Director determined that language of the stipulated election agreement clearly and unambiguously indicated that the parties intended to include the classification of a social worker. (Decision at 3). However, despite the Regional Director's determination that the classification of social worker was clearly and unambiguous included in the stipulated bargaining unit, she could not even decide which specific language to analyze. As the Regional Director acknowledged, Legal Aid's employees voted whether they wanted to be represented by the Union in two separate groups. (Decision at 2-3). First, the majority of professional employees voted whether or not they wanted to be represented by the Union. Then, the combined unit of professional and non-professional employees voted whether they wanted to be represented by the Union. However, it is important to note the agreed-upon stipulated bargaining unit for each group:

> **VOTING GROUP - UNIT A (PROFESSIONAL UNIT):**
>
> All full-time and regular part-time professional employees employed by the Employer at its Covington, Kentucky location, including attorneys, but excluding all non-professional employees, unit managers, managing attorneys, law clerks, office managers, guards and all supervisors as defined by the National Labor Relations Act.
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> **VOTING GROUP - UNIT B (NON-PROFESSIONAL UNIT):**
>
> All full-time and regular part-time non-professional employees employed by the Employer at its Covington, Kentucky location, including paralegals, support

> staff, and *all other permanent employees and temporary employees* whose term of employment is to exceed one year in length, but excluding all attorneys, professional employees, unit managers, managing attorneys, law clerks, office managers, guards and all supervisors as defined by the National Labor Relations Act. (Emphasis added).

The Regional Director used a combined version of this language in her decision, which was not specifically agreed to by either party.[4] (Decision at 1). Neither description includes the classification of a social worker. The Union abandoned the social worker position in the description, which demonstrates that the parties did not intend to include it. Further, Board precedent clearly states that when the express language of a stipulation neither specifically includes nor specifically excludes a classification, the parties' intent with regard to that position is unclear. *Caesars Tahoe,* 337 NLRB at 1097. Here, the stipulated agreement did not specifically include or exclude the social worker position under the professional unit description, and the Regional Director should have applied Board precedent to determine the parties' intent.

1. Sarah Lowe is a Professional Employee, and the Regional Director Should have Analyzed the Appropriate Stipulated Bargaining Language.

The Regional Director determined that Sarah Lowe was a non-professional employee, and as such the language "all other permanent and temporary employees whose terms of employment is to exceed one year in length" encompasses the social worker position. (Decision at 3). The Regional Director made this determination while acknowledging that the Hearing Officer did not collect any specific evidence on the issue, and "did not expressly address the

[4] Critically, only the non-professional unit includes the catch-all language "all other permanent employees and temporary employees."

issue."[5] *Id.* The Regional Director determined that Sarah Lowe was a non-professional employee because her "pay scale is based on that of paralegals, another group included in Voting Group B."

The Regional Director's determination is contrary to the evidence in the record, and long-standing Board precedent. The Board has long held that salary is not a permissible basis upon which to determine supervisory status. *E.W. Scripps Co.*, 94 NLRB 227, 240 (1951). Further, the Regional Director incorrectly analyzed the evidence on the record. She emphasized that Ms. Lowe was paid on the paralegal pay scale. However, the only other classification in the professional unit is an attorney and there is a separate attorney pay scale, which naturally as a non-attorney, Ms. Lowe would not be paid on that scale. (Tr. 213; 216).

The Regional Director's determination was also directly contrary to the plain language of the National Labor Relations Act and long-standing Board precedent. Pursuant to Section 2(12) of the Act a professional employee is defined as:

> [A]ny employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes; or
>
> [A]ny employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to

[5] Further, despite the Regional Director's suggestion to the contrary, it is the Region's obligation to determine the professional status of employees when it is put on notice that there is an issue as to professional status. *Pontiac Osteopathic Hosp.*, 327 NLRB 1172 (1999).

> qualify himself to become a professional employee as defined in paragraph [above].

29 U.S.C. § 152(12). Accordingly, by the plain language of the statute, a professional employee is not defined by salary, but she is defined in terms of the work she performs, and it is the work that is controlling. *W. Elec. Co.*, 126 NLRB 1346, 1348 (1960); *Chesapeake & Potomac Tel. Co.*, 192 NLRB 483, 484 (1971); *Loral Elecs. Sys.*, 200 NLRB 1019, 1021 (1972); *Avco Corp.*, 313 NLRB 1357 (1994).

Board precedent supports the proposition that a social worker is considered a professional position. See, e.g., *The Holliswood Hosp.*, 312 NLRB 1185, fn. 43 (1993); *Valley Hosp.*, 220 NLRB 1339, 1342 (1975). In *Mount Airy Psychiatric Center*, the Board found social workers were professional employees because "they have received training and/or advanced education in their respective fields. [The social workers] apply this education in their […] field[.] The record shows that they apply this training as part of their daily jobs and their work is intellectual and requires the exercise of independent discretion and judgment." *Mount Airy Psychiatric Ctr.*, 253 NLRB 1003, 1005 (1981). Similarly, Ms. Lowe has received education in her respective field. She has a bachelor's degree in social work (BSW) and was required to have social work experience, a social work degree, and training in order to obtain her position. (Tr. 46; 180; 186, 187). In her position, she independently evaluates issues and decides whether to provide social work services. (Tr. 87; 187). Executive Director Joshua Crabtree testified, "Sarah just decides from her own assessment […] to provide assistance." (Tr. 87). Mr. Crabtree explained that Ms. Lowe works closely with her supervisor, Brian DuFresne, who has a masters' in social work, because the other attorneys do not understand her role or what her case management responsibilities are. (Tr. 89). Advocacy Director Karen Ginn testified that

although she monitors the work of every other employee, she does not monitor Ms. Lowe's work because her special skills and job requirements. (Tr. 45). Accordingly, the record establishes that she is a professional employee.

As a professional employee, Ms. Lowe should have been included in the Group A voting group. Contrary to the Regional Director's assertion, there is no language in the professional unit description that demonstrates that a social worker position should have been included in the proposed bargaining unit. (Decision at 3). Additionally, there is no catch-all language in the professional unit description that demonstrates that the parties intended to include Ms. Lowe, such as all other employees. The social worker designation is not referenced in any capacity in the Group A voting language.

The Regional Director determined that because the language stated, "all full-time and regular part-time professional employees," the social worker designation is included even though it is not referenced in the express language of the stipulated bargaining unit. (Decision at 3). The catch-all language the Regional Director refers to "professional employees" is used to merely designate and distinguish the two groups, and was drafted by the Region. All other employees employed at the Employer's Covington location are specifically listed, i.e. attorneys, paralegals, support staff. Board precedent establishes where the Union knew about a position, but failed to include it in the stipulated bargaining unit, the parties' intent is clear that the position was not intended to be included. *Nw. Cmty. Hosp.*, 331 NLRB 307, 308 (2000); *Reg'l Emergency Med. Servs.*, 354 NLRB 224, 224-225 (2009). Here, the Union was aware of the social worker position, but abandoned their intention to include it in the unit. Accordingly, the parties clearly intended to exclude the social worker position.

If the Board decides the classification is not excluded, the parties' intent is unclear. Board precedent establishes that where the express language of a stipulation neither specifically includes nor specifically excludes a classification, the parties' intent with regard to that position is unclear. *Caesars Tahoe*, 337 NLRB 1096, 1097 (2002); *R.H. Peters Chevrolet*, 303 NLRB 791 (1991); *Lear Siegler*, 287 NLRB 372 (1987). Here, since the social worker classification is neither listed as expressly included or excluded, the parties' intent with respect to that position is unclear. Unlike the social worker position, the parties specifically listed all other classifications that voted during the election. Accordingly, the parties' intent is unclear and the Regional Director should have progressed to the second step of the *Caesars Tahoe* analysis.

2. Sarah Lowe Should Still be Excluded by the Language of the Stipulated Bargaining Unit if She is a Non-Professional Employee.

Similarly, even if the social worker classification was analyzed as a nonprofessional employee as the Regional Director contends, her position should still be excluded because the Union was aware of the social worker position, but abandoned their intention to include it in the unit. *Nw. Cmty. Hosp.*, 331 NLRB at 308; *Reg'l Emergency Med. Servs.*, 354 NLRB at 224-225. In the alternative, the parties' intent is unclear because her classification is not specifically excluded from the proposed bargaining unit. Accordingly, under either analysis, the Regional Director should have progressed to the second step of the *Caesars Tahoe* analysis.

ii. The Extrinsic Evidence Demonstrates the Parties' Intention to Exclude the Social Worker Classification.

The next step of the *Caesars Tahoe* analysis requires an analysis of the parties' intent through normal methods of contract interpretation, including an examination of extrinsic evidence. The Regional Director argues that even though the Hearing Officer completely

neglected the second step of the *Caesars Tahoe* analysis contrary to Board precedent, his omission is immaterial because the Union did not agree to exclude the social worker position. (Decision at 3). Contrary to the Regional Director's assertion, the Union's actions demonstrate that it excluded the social worker position from the proposed bargaining unit.

Here, the extrinsic evidence is clear that the parties' did not intend to include the social worker designation in the proposed bargaining unit. During the negotiation of the stipulated bargaining unit, on January 22, 2020, Legal Aid's e-mail to Region 9 Board Agent Tim Studer asked, "Would we vote the social worker under challenge because we will not agree to including that classification in the unit?" *See* Exhibit 1. As requested by Legal Aid's counsel, the next bargaining unit proposed by the Board Agent excluded the designation, which demonstrates that the parties intended not to include the designation in the unit.

After the parties executed the stipulated election agreement, which did not include any bargaining unit with the social worker designation, Legal Aid submitted an *Excelsior* list which did not include Ms. Lowe. This further demonstrates that Legal Aid did not intend to include the social worker position (Ms. Lowe) in the proposed bargaining unit. Finally, Legal Aid's counsel e-mailed the Board Agent at the time the *Excelsior* list was submitted, and informed the Board Agent that the parties' "never agreed [Ms. Lowe] or [the social worker] designation was in the voting unit….we agreed to disagree and she can be voted under challenge. There has never been a social worker in the unit." *See* Exhibit 2. Accordingly, the extrinsic evidence is clear—the parties never intended to include the social worker unit. There has never been a social worker in the bargaining unit at Legal Aid's Morehead or Ashland locations, and there has never been a social worker employed at Legal Aid before Ms. Lowe. Assuming, *arguendo*, the extrinsic evidence does not provide sufficient evidence of intent, the next appropriate step

is to apply the community-of-interest standard. As discussed, *infra*, Ms. Lowe does not share a community-of-interest with the proposed bargaining unit.

iii. Sarah Lowe Does Not Share a Community of Interest with the Proposed Bargaining Unit.

The Regional Director failed to properly apply the community of interest standard. She ignored the record evidence, and failed to properly consider all of the relevant factors. (Decision at 4). If the stipulated election agreement cannot be resolved by extrinsic evidence, the Board analyzes whether the proposed classification shares a community of interest with the rest of the proposed bargaining unit. *Caesars Tahoe*, 337 NLRB at 1097. In order to examine whether a proposed classification shares a community of interest, the Board applies the following multi-factor test, which requires the Board to assess:

> whether the employees are organized into a separate department; have distinct skills and training, have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between the classifications, are functionally integrated with the Employer's other employees, have frequent contact with other employees, interchange with other employees, have distinct terms and conditions of employment, and are separately supervised.

PCC Structurals, Inc., 365 NLRB No. 160 (2017). Without referring to any evidence in the record, the Regional Director found that Ms. Lowe shared a community of interest with the proposed bargaining unit because the factors of whether she was organized into a separate department, she is functionally integrated with other employees in the unit, and has frequent contact with them and has distinct terms and conditions of employment supported inclusion. (Decision at 4). First of all, the Regional Director noted these factors but failed to cite any evidence or even give any indication as to how they were weighed. The Regional Director failed to consider the majority of the relevant criteria, including whether Ms. Lowe has distinct skills

and training, and has distinct job functions and performs distinct work, including inquiry into the amount and type of job overlap between the classifications, and is separately supervised. The record evidence clearly rebuts the Regional Director's determination. Ms. Lowe does not share a community of interest with the proposed bargaining unit.

1. The Regional Director Failed to Consider the Impact of Sarah Lowe's Single Funding Source on All Aspects of her Employment.

The Regional Director also failed to properly weigh the fact that Ms. Lowe is exclusively funded through one funding source. Ms. Lowe's funding underlies all of her employment conditions, and her employment duration. By virtue of Ms. Lowe's position being funded exclusively through the Department of Justice grant, her position may be eliminated if Legal Aid is unable to secure future funding. The Regional Director dismissed this argument because in her view, "the fact that funding for Ms. Lowe's position comes from a single source is insufficient to overcome the similarities between her position and other positions in the stipulated unit." (Decision at 5). However, the Regional Director's conclusion is false. The fact that Ms. Lowe's position is singularly funded necessarily makes her position distinct. All of Legal Aid's employees' positions, except for Ms. Lowe, are funded by a variety of sources. Ms. Lowe is the only employee in the entire organization that is funded through a single funding source. (Tr. 42; 85; 144; 146). All other employees are funded through a variety of funding sources, of which includes the legal services corporation. (Tr. 42; 83-84; 144-145). Ms. Lowe's allocation to a single funding source has a direct impact on her continued employment in the event Legal Aid is unable to obtain additional funding from the Department of Justice. If Legal Aid is unable to obtain additional funding from the Department of Justice, Legal Aid would have no choice but to terminate Ms. Lowe. (Tr. 84).

Ms. Lowe was aware that her position was dependent on continued funding at the time of her hire. Ms. Lowe was specifically hired after Legal Aid was awarded the Department of Justice grant in February 2019. (Tr. 41). Ms. Ginn and Mr. Crabtree interviewed Ms. Lowe for her position. During that interview, Ms. Ginn and Mr. Crabtree specifically informed Ms. Lowe that Legal Aid only had a three year grant through the Department of Justice that would be the basis of their funding, and they did not have a place for a social worker outside of the grant.[6] (Tr. 42; Tr. 82-84). Ms. Lowe admitted that she was informed that there was no guarantee of continued funding by the Department of Justice, and that her funding came exclusively from that funding source. (Tr. 190-191).

By virtue of being funded by a single source, Ms. Lowe's funding is the only source of funding that impacts an employee's continued employment. As Mr. Crabtree testified, besides Ms. Lowe, "[a]s a practice, [Legal Aid] [tries] not to allocate anybody to more than 25 to 30 percent to a particular funder." (Tr. 84). As a result, Legal Aid could absorb employees that lost one of their funding sources into the rest of the organization. (Tr. 84). Specifically, if Legal Aid lost the Department of Justice grant, the attorneys working on the project would be absorbed into other funding sources or Legal Aid "has open positions they would move into." However, unlike every other employee, "there is no place to absorb a social worker." (Tr. 84).

Additionally, the fact that Ms. Lowe's position is funded from a single funding source has an impact on her job responsibilities. As Mr. Crabtree testified:

> I'll tell you why that's difficult. We have to draw very distinct lines when somebody can only be used by one funding source, and I don't like that that happens, because, you know, you usually have overlap or people that – interactions that are more free kind of say 'Oh, can you cover this for me?'

[6] In this manner, Ms. Lowe's position is similar to contract employees and law clerks, who were also not included in the proposed bargaining unit.

> or 'Can you do something?' Can you attend this event for me,' and people can work those things out.
>
> It draws such a box around a person with a hundred percent that they can't fill in other spots. So it's—so that's why I don't like it as a policy. So she's a hundred percent within that—the confines of that funding. (Tr. 85-86).

The Board has long held that when a classification of employees is hired exclusively under a federally funded program without any guarantee of continued funding, it rebuts the community of interest. *The Mental Health & Family Servs. Ctr.*, 225 NLRB 780, 781 (1976); *Jewish Hosp. of Cincinnati*, 223 NLRB 614, 618 (1976). In *The Mental Health & Family Services Center*, the Board excluded CETA employees in accordance with Board precedent that persons "employed in Government programs and whose tenure is controlled by the Government are not included in units with other employees." *The Mental Health & Family Servs. Ctr.*, 225 NLRB at 781. In making this decision, the Board noted that there was "no evidence that CETA funding for any of the individuals currently employed under the program will be renewed or that such persons will be retained in the Employer's employ in the event funding is terminated." *Id.* Further, the Board noted that CETA employees have access to a special grievance procedure to which other employees do not.

The Regional Director dismissed the argument that the CETA employees are directly analogous to Ms. Lowe because the Department of Justice does not have "ongoing oversight or control." (Decision at 4). However, the Regional Director overlooked that every other employee, other than Ms. Lowe, has ongoing oversight or control by virtue of their funding through the legal services corporation. It is akin to the entire unit being CETA employees, and trying to include a non-CETA employee in that unit. Ms. Lowe is not required to comply with the regulations of the legal services corporation, unlike every other employee. She can come

and go as she pleases, and is not required to report to Ms. Ginn, unlike every other employee. (Tr. 45; Tr. 85-86). Additionally, like the CETA employees, Ms. Lowe's funding has an impact on the duration of her employment. Ms. Lowe is similarly employed by a single funding source with no evidence that it will be renewed or that she will be retained in the Employer's employ in the event funding is terminated.

Similarly, in *Trustees of Columbia University*, the Board excluded employees whose funding came from non-university funding sources. *Trs. of Columbia Univ.*, 222 NLRB 309, 310 (1976). The Board noted that employees who worked at a research laboratory were not appropriately included in a unit of university employees. The Board noted that nearly all of the laboratory's funds were provided by the federal government. The Board also noted that the laboratory conducted a distinct function separate from the rest of the university and concluded that as a result of "its independent function and operation [and] the fact that it derives its funds from non-university sources," the employees had a separate and distinct community of interest and should be excluded. The Regional Director dismissed this argument because in her view, there were no other dissimilarities between Ms. Lowe's employment and the rest of the bargaining unit. (Decision at 5). However, as discussed *supra*, the Regional Director blatantly ignored multiple other dissimilarities between Ms. Lowe's employment and the rest of the employees in the proposed bargaining unit in order to bolster the Hearing Officer's flawed reasoning. Ms. Lowe's position is very similar to the research employees. Her funding is completely derived from one separate funding source. Additionally, Ms. Lowe performs an independent function and operation, which is distinct from the legal work and legal support work that the rest of the organization performs. Accordingly, Ms. Lowe does not share a community of interest with the rest of the bargaining unit employees.

In a similar case involving another legal aid organization, the Regional Director noted that each law group had its own funding source, and the funds could not be commingled. *Legal Aid and Def. Assoc.*, 07-RC-23186, 2008 NLRB Reg. Dir. LEXIS 131 (May 22, 2008). The Regional Director noted that funding from the Legal Services Corporation, in particular, was subject to rigorous requirements including reporting requirements, and restrictions on clients and subjects of cases. The Regional Director determined that the separate funding weighed against finding a community of interest, concluding "the different demands placed upon the organization by the funding sources would make collective bargaining on behalf of the attorneys in all four practice groups problematic at best." *Id.* Similarly, the fact that Ms. Lowe is funded so distinctly from all other employees at Legal Aid with certain restrictions associated with that funding ultimately weighs against a finding of a community of interest with the rest of the proposed bargaining unit.

2. Sarah Lowe Works in a Separate Department.

Contrary to the Regional Director's determination, Ms. Lowe does work in a separate department from any other employee at the Employer's Covington, Kentucky location. Ms. Lowe is employed in Legal Aid's KidsRise program. (Tr. 176). The KidsRise program focuses its mission on seven Kentucky counties, which notably does not include Kenton County, where Legal Aid's Covington, Kentucky office is located. (Tr. 44; E-3). The KidsRise program is led by the Housing Unit Manager Brian DuFresne, who works in the Lexington, Kentucky office. (Tr. 40). The other employees assigned to the program besides Ms. Lowe are an attorney in the Morehead office; and an attorney in the Lexington office. (Tr. 144-145). Ms. Lowe's position was not designed specifically to be located in Covington. (Tr. 44). Instead, Legal Aid was

flexible on where this position would be located because it was designed to be focused outside of the office environment, and imbedded in the local community. (Tr. 44).

3. Sarah Lowe is Not Functionally Integrated with Other Employees in the Stipulated Bargaining Unit.

Contrary to the Regional Director's determination, Ms. Lowe is not functionally integrated with other employees in the proposed bargaining unit. The Hearing Officer admitted in his Report on Challenged Ballots, upon which the Regional Director relies, that "there is no evidence of interchange between Ms. Lowe and the other members of the stipulated unit." (Hearing Officer's Report on Challenged Ballots ("Report"), at 11). Ms. Lowe's only interaction with the employees in the Covington office is social, and her office is located on a different floor from all proposed bargaining unit employees. (Tr. 46-47). Furthermore, although she is on the KidsRise team, her job responsibilities operate independently and do not rely upon or directly support the legal functions of the program. See *United Operations, Inc.*, 338 NLRB 123, 124 (2002); *Cristal USA*, 365 NLRB No. 82 (2017) (employees with limited interchange are appropriately in separate unit).

4. Sarah Lowe Does Not Have Frequent Professional Contact with Other Employees in the Proposed Bargaining Unit.

Contrary to the Regional Director's determination, Ms. Lowe does not have frequent contact with other members of the stipulated bargaining unit. Ms. Lowe testified that she interacts with employees outside of the KidsRise program "once every couple months." (Tr. 184). She performs her job functions independently, and does not interact with any other employees to perform her duties. (Tr. 69; 87). See *United Operations, Inc.*, 338 NLRB at 124; *Cristal USA*, 365 NLRB No. 82 (2017) (employees who share facility-wide terms and conditions of employment, but limited actual contact and interchange are appropriately in

separate unit); *Bergdorf Goodman*, 361 NLRB No. 11 (2014) (employees with limited contact and separate managers properly in different units).

5. Sarah Lowe has Distinct Terms and Conditions of Employment.

Contrary to the Regional Director's determination, Ms. Lowe has distinct terms and conditions of employment. Unlike all the other employees in Covington, Ms. Lowe does not have to report in to Ms. Ginn about what she is doing or whether she will be in the office. (Tr. 45). Additionally, Ms. Lowe's employment is funded exclusively through KidsRise and is subject to Legal Aid being awarded the grant. She is not subject to the regulations of the Legal Services Corporation (LSC). (Tr. 48). The Regional Director failed to acknowledge the significance of Ms. Lowe not being subject to LSC's extensive requirements.[7] All other employees are funded, in whole or in part, by the LSC. (Tr. 48-49). All other employees at Legal Aid, including support staff, perform legal work or support legal work. (Tr. 49; 187). Ms. Lowe is the only employee at Legal Aid that does not perform legal work and the only employee at the Legal Aid that is not subject to the legal services corporation's regulations.[8] (Tr. 49). *Overnite Transp. Co.*, 331 NLRB 662, 664 (2000); *Harron Comm.*, 308 NLRB 62, fn. 1 (1992); *Bradley Steel, Inc.*, 342 NLRB 215, 216 (2004).

6. Sarah Lowe has Distinct Skills and Training.

Additionally, the Regional Director failed to consider that Ms. Lowe has distinct skills and training. Ms. Lowe has specialized skills as a social worker, which requires a bachelors in

[7] The Employer asks the Board take judicial notice of LSC regulations, which are located at 45 CFR §§ 1600-1644. The regulations govern everything from hiring to time keeping to clientele requirements.

[8] Nonetheless, Ms. Lowe still has regular interactions with employees in the Lexington office, where her supervisor is located and another member of the KidsRise team. Ms. Lowe's exclusion from this proposed bargaining unit would not result in her being a residual employees, as discussed *infra*.

social work (BSW) degree. There are no other employees at Legal Aid who are required to have these skills. As a result of her specialized skills and training, Ms. Lowe performs non-legal case management work that no other employees perform or have the ability to perform. Ms. Lowe is the only employee at Legal Aid that does not perform legal work and the only employee at the Legal Aid that is not subject to the legal services corporation's regulations. (Tr. 49). *United Operations, Inc.*, 338 NLRB at 124 (specialized skills support a separate unit); *Overnite Transp. Co.*, 331 NLRB at 664 (classifications of employees who perform a separate function and possess special skills and qualifications not appropriate in the unit); *Harron Comm.*, 308 NLRB at fn. 1 (classification of employees that must have specialized experience appropriately not included in the unit). The Board has cautioned that employees who perform a separate function, possess special skills and qualification, and do not have overlapping duties or interchange with the proposed unit are not properly included. *Power, Inc.*, 311 NLRB 599, 608 (1993). Ms. Lowe does not work on any cases with any other employees, and can decide, at her own discretion, whether or not to pursue cases. As Mr. Crabtree explained:

> [Sarah Lowe's interaction with other attorneys in the Kids Rise program is] mainly when a legal case is concluded. […] [O]nce the legal issue is concluded, then the case can be referred to Sarah for case management. Sarah just decides from her own assessment at that point whether or not it's like okay, this family seems pretty solid. They don't need anything else from me. If you—you know, here's my card. Call me if you have something that I can help you with. Other families might need a little bit more, like 'I don't know how to sign up for SNAP benefits, how can I do that?' so to provide assistance. (Tr. 87).

Ms. Lowe does not collaborate with any other employees in order to perform her job duties, and makes an individual assessment about whether to proceed with a case. Additionally, a client is not even required to have a legal matter for Ms. Lowe to work with them or their families. (Tr. 187). Ms. Lowe is also eligible to work with an entire population of clients,

children, which Legal Aid does not normally serve. Furthermore, as a result of her specialized skills and training, Ms. Lowe is not able to substitute for any other employee in the unit. She performs absolutely no legal work or legal support work like the rest of the proposed bargaining unit.

7. Sarah Lowe's Exclusion from the Bargaining Unit Would Not Result in her being a Residual Employee.

Finally, the Regional Director erroneously concluded that a failure to include Ms. Lowe in the bargaining unit would "leave her as the sole non-represented employee employed by the Employer, a residual unit of one with no opportunity for collective bargaining." The Regional Director blatantly ignored the evidence in the record. In addition to the petitioned for bargaining unit, the Employer employs law clerks and contract employees. (Tr. 29; 122-123; 150). The Employer also has employees located in Lexington, where Ms. Lowe's supervisor is located and one of the other members of her team. (Tr. 49). If Ms. Lowe had to be grouped with any Legal Aid employees, she would be most appropriately grouped with the employees who work in Lexington. The employees in Lexington are not represented by the Union. Accordingly, Ms. Lowe would not be a one-person unit as the Employer has many employees who are not represented by the Union. Ms. Lowe does not have a community of interest with the proposed bargaining unit and should be excluded.

B. The Regional Director Erred in Her Decision that Tiffany Williamson-Coleman is an Employee under the Act.

i. The Regional Director Erred in Finding Ms. Williamson-Coleman Left Her Position as Intake Managing Attorney.

Ms. Williamson-Coleman has been the Intake Managing Attorney since August 30, 2013. The Regional Director agreed with the Hearing Officer's finding that Ms. Williamson-Coleman left her position as the intake managing attorney in the fall of 2017. (Decision at 5).

According to the Hearing Officer, she then became part of the family law unit, and rejoined the intake department in May 2018. (Decision at 6). The Regional Director's determination is contradicted by the manifest weight of the evidence presented at the hearing.

Contrary to the Regional Director's determination, Ms. Williamson-Coleman has never left her position as the Intake Managing Attorney. During the time that she allegedly left her position, Ms. Williamson-Coleman experienced some personal issues outside of work, and some health problems. (Tr. 112-113). During this time, Ms. Williamson-Coleman took a leave of absence for around two months when her husband died. (Tr. 204-205). When she returned, she was experiencing significant health issues. Ms. Williamson-Coleman is on dialysis, which is performed at her house, and prevents her from traveling. (Tr. 117). Consequently, she cannot perform all of the required functions that other managers perform and Ms. Ginn has been assisting her with her responsibility, but she retains her supervisory position. (Tr. 26; Tr. 113). Ms. Williamson-Coleman was never been demoted, nor was any other person promoted into her position. (Tr. 112). Additionally, although Legal Aid restructured the substantive law units in 2018, Ms. Williamson-Coleman's role never changed. (Tr. 111). It was proposed that Ms. Williamson-Coleman move to the family law unit, but this never came to fruition. (Tr. 110). Ms. Williamson-Coleman at all times retained her position as the Intake Managing Attorney, which is supported by her salary descriptions from 2017-2020. (Tr. 111; E-10; E-11; E-12).

The record testimony and objective documentation support that Ms. Williamson-Coleman has remained in the Intake Managing Attorney position. Both Mr. Crabtree and Ms. Ginn testified that a formal change in units and position never came to fruition. (Tr. 58; Tr. 111). The Hearing Office even noted, when discrediting their testimony that Mr. Crabtree and Ms. Ginn were generally credible witnesses. (Report at 5). Mr. Crabtree's and Ms. Ginn's

testimony on this issue was exactly the same, and there is no reason to believe the Executive Director and the Advocacy Director would not be intimately familiar with a proposed complete restructuring of their entire organization and whether or not it took place.

The Regional Director relied completely on the Hearing Officer's credibility finding to make this determination. (Decision at 5). However, the Hearing Officer's credibility decision was flawed, directly contradicted by evidence on the record, and should not be relied upon. Ms. Williamson-Coleman's testimony was directly rebutted by the consistent testimony of Mr. Crabtree, Ms. Ginn, and Mr. Durr. Corroboration and the relative reliability of conflicting testimony are also significant. See, e.g., *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony). Further, Mr. Crabtree, Ms. Ginn and Mr. Durr's testimony was buttressed by the objective documentary evidence of Ms. Williamson-Coleman's yearly salary increases which listed her as "intake managing attorney." (Tr. 65-66; Tr. 95; E-10; E-11; E-12).

When confronted with this objective evidence, Ms. Williamson-Coleman astonishingly claimed she had never seen her yearly salary increase even though they are sent to the business e-mail addresses of all employees and Ms. Williamson-Coleman's colleague Cindy Millay was able to easily locate and produce hers. (Tr. 208; U-1). Incredibly, Ms. Williamson-Coleman was unable to produce any evidence on the record to support her position that she was not the intake managing attorney, and instead an intake attorney. Nor did she produce any documentation to substantiate her testimony that she became part of the family law unit. There are no emails, memos or records that indicated she was transferred or similar documentation that showed she was in that position.

Furthermore, Ms. Williamson-Coleman admitted that she never ceased performing intake functions during her alleged change in position. (Tr. 154; 166). Ms. Williamson-Coleman also admitted that no other employee was promoted to the Intake Managing Attorney position, and failed to explain why Legal Aid had recurring documentation, which referred to her as the Intake Managing Attorney from 2017-2020. (Tr. 111; 169; 175). Additionally, Ms. Williamson-Coleman failed to explain why if she was no longer the Intake Managing Attorney, she was responsible for leading staff-wide training on intake on December 7, 2017, after she allegedly no longer held that position, at a conference led by other managers and supervisors. (Tr. 29). Ms. Williamson-Coleman was unable to produce any evidence on the record to support her position that she was a staff-level intake attorney. Ms. Williamson-Coleman failed to produce any documentation (including e-mails, memorandum, or records) indicating that she was transferred to another position. Ms. Williamson-Coleman was unable to produce any documentation to support her claims because it is simply not true. Instead, Ms. Williamson-Coleman has continued to work in her Intake Managing Attorney position, and Legal Aid has supported her through her personal and health issues, which necessitated a leave of absence. (Tr. 112-113; 204-205). Accordingly, the Regional Director erred in finding that Ms. Williamson-Coleman left her position.

ii. The Regional Director Erred in Finding Ms. Williamson-Coleman Performing Performance Evaluations Was Not Evidence of Supervisory Indicia.

It is undisputed that Ms. Williamson-Coleman performed the performance evaluations for employees Belinda Gullette, Cathy Jackson, and Terry Cannon. It is also undisputed that Ms. Williamson-Coleman performed the last performance evaluations in the intake department because there have not been any new employees in the intake department necessitating further

evaluations. (Tr. 33; Tr. 113-114). Mr. Crabtree testified that he determines whether an employee receives a salary increase or is retained based on the evaluation submitted by the employee's supervisor. (Tr. 103). Mr. Crabtree has increased an employee's pay and/or retained his or her employment on every occasion that Ms. Williamson-Coleman submitted a positive evaluation. (Tr. 100-103).

Further, Mr. Crabtree specifically testified that based on a positive recommendation, an employee would receive an increase in pay and continued employment. With each employee demonstrated, Ms. Williamson-Coleman recommended continued employment and her recommendations were followed as a matter of course. As Mr. Crabtree testified:

> Q: Any why are—why was this [evaluation of Terry Cannon] performed?
>
> A: This would—I can tell you that this would have been during his temporary status and before he would have been moved to a permanent employee, this would have been that.
>
> Q: And would Ms. Williamson-Coleman's recommendation of him being moved off of temporary status been given to you or the advocacy director at the time?
>
> A: Yes. The process is they give me the evaluation. I solicit other feedback when the time comes, and then I make a determination, and usually respond with a based on the recommendation of your supervisor, you've moved from temporary to permanent status. Congratulations. Thank you for your work on behalf of the client. Good luck, something. (Tr. 97).

Ms. Williamson-Coleman's actions meet the criteria listed under Section 2(11) of the Act. *See* 29 U.S.C. § 152(11). Section 2(11) of the Act specifies that a supervisor is:

> [A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend layoff, recall, promote, discharge, assign, reward, or discipline other employees, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

For example, in *Cape Cod Nursing & Retirement Home*, the employer's licensed practical nurses (LPNs) were responsible for completing evaluations for nursing assistants (NAs). The NAs were evaluated at the end of their 90-day probationary period by the LPNS (or registered nurses). The LPNs used a form that listed various performance qualities and skills, and assigned a numerical ranking from 1 to 5 in a variety of categories. The LPN also had an opportunity to provide written comments on the evaluation form. There was no evidence that the evaluation form contained a recommendation as to whether the employee should be hired, discharged, or retained in temporary status for some period of time. Then, the LPN sent the evaluation to the Director of Nursing or the Administrator. The Director of Nursing testified that the evaluations are "totally what [she went] by" when assigning specific raises. The Board found that the LPNs were supervisors under the Act because it was "undisputed that only the [LPNs] assign the individual ratings and that these ratings are the sole basis for the overall rating on which the specific percentage increase is awarded. As there is a direct correlation between the evaluations and the merit increases awarded, [the Board] concluded that the Employer's LPNs […] were statutory supervisors within the meaning of Section 2(11) of the Act. *Cape Cod Nursing and Retirement Home*, 329 NLRB 233, 233-234 (1999). Here, Legal Aid's evaluations operate in exactly the same way as in that case. Ms. Williamson-Coleman is the only individual responsible for providing individual ratings, and Mr. Crabtree relies on her recommendation in order to determine whether to continue an employee's employment or grant them additional pay. See also *L.A. Film Sch., LLC*, 31-RC-8796, 2010 NLRB Reg. Dir. Dec. LEXIS 179 (July 15, 2010) (evaluations for probationary employees found to directly impact employment and establish supervisory status); *Tenn. Educ. Assoc.*, 26-UC-200, 2009 NLRB Reg. Dir. Dec. LEXIS 152 (Sept. 11, 2009) (same). Accordingly, this case demonstrates that

Ms. Williamson-Coleman has the supervisory indicia to effectively recommend an increase in pay pursuant to Section 2(11) of the Act.

Similarly, in *Hillhaven Kona Healthcare Center*, the Board determined that nurses were supervisors under the Act because they performed the evaluations of certified nursing assistants (CNAs). The nurses used prepared written guidelines, without consultation with higher management, and assigned the employee a rating on ten factors with a numerical score from 1 to 5, and provided a brief written comment on each factor. If the employee had a high enough score, the employee would be eligible for a raise. Then, the nurses met with CNAs to review the evaluations. The nurses were not aware of the actual raise given to each employee after the completed their evaluation. There was no evidence that the form contained a recommendation as to whether the employee should be hired, discharged, or retained in temporary status for some period of time. The Board noted that there was no evidence that the Director of Nursing or administrator independently investigates the basis for the evaluations or changes the numerical ratings assigned. The Board determined that the nurses were supervisors under the Act because the evaluations they completed directly affected the salaries of nurses' aides. *Hillhaven Kona Healthcare Ctr.*, 323 NLRB 1171, 1171-1172 (1997). Here, Legal Aid's evaluations operate in exactly the same way as in that case. Ms. Williamson-Coleman assigns a numerical ranking and meets with the employee about his or her evaluation. Mr. Crabtree does not independently investigate the basis of the ratings; in fact, he testified that he relies upon Ms. Williamson-Coleman's ratings because he does not have any opportunity to directly observe the employees. (Tr. 103). Then, based on those ratings, Mr. Crabtree decides to continue the employee's employment and offer him or her a merit raise. Mr. Crabtree has always followed Ms. Williamson-Coleman's recommendations. Accordingly, Board precedent

clearly establishes that Ms. Williamson-Coleman's role in performing performance evaluations indicates that she is a supervisor under Section 2(11) of the Act.

Ms. Williamson-Coleman used independent judgment to conduct these evaluations. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006). The evaluations were based on her own review of the employee's performance, and offered areas for improvement. Ms. Williamson-Coleman then met with the employee independently to discuss his or her performance. She did not consult with management at any time before she issued her performance evaluation. Accordingly, the evidence establishes that Ms. Williamson-Coleman possesses supervisory indicia under Section 2(11) of the Act, which she exercises with independent judgment.

Nonetheless, the Regional Director determined that even if Ms. Williamson-Coleman's role in performing performance evaluations confers supervisory status, "the credited evidence established that [Ms.] Williamson-Coleman no longer holds that position, so such evaluations are not probative of her present status." (Decision at 6). The fact that Ms. Williamson-Coleman did not recently perform the performance evaluations does not diminish the fact that she possesses the authority to conduct them. See *Jack Holland & Son, Inc.*, 347 NLRB 263, 265 (1978) ("an individual with statutory supervisory authority does not lose his/her status simply because they infrequently exercise their authority"). The Board has consistently held that if an individual possesses supervisory authority, even if the authority is not frequently exercised, that is sufficient to establish supervisory status. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001); *Opelika Foundry*, 281 NLRB 897, 899 (1986); *DST Indus.*, 310 NLRB 957 (1993). Furthermore, an employer's desire to accommodate a supervisor's personal issues, does not mean that the supervisor does not possess supervisory indicia under the Act. See, e.g., *Hercules*

Auto., Inc., 285 NLRB 944, 946 (1987) (employer accommodated supervisor by paying him differently due to a social security issue is not inconsistent with his supervisory status). There is no evidence that someone else has exercised Ms. Williamson-Coleman's supervisory indicia in her place, or that another person now exercises that authority in her stead. Accordingly, the manifest weight of the evidence and Board precedent establish that Ms. Williamson-Coleman is a supervisor under the Act.

iii. The Regional Director Erred in Finding Ms. Williamson-Coleman's Responsibility for Training Employees Was Not Evidence of Supervisory Indicia.

The Regional Director found that Ms. Williamson-Coleman's responsibility in training employees was not evidence of supervisory indicia. (Decision at 5). Ms. Williamson-Coleman is held responsible for training employees about intake. It is a critical function of her management duties, as outlined in Legal Aid's Standards for Legal Supervision. (Tr. 26; E-2). Legal Aid emphasizes that all of their supervisors operate as teachers, mentors, and monitors. (Tr. 115-116). Ms. Williamson-Coleman is expected to meet those expectations, and Legal Aid has been diligently collaborating with her to ensure that she does. (Tr. 26; Tr. 113).

In *K.B.I. Security Services*, the putative supervisor was responsible for training assistant road supervisors and for generally supporting such supervisors. *K.B.I Sec. Serv., Inc.*, 318 NLRB 268, 268 (1995). The putative supervisor described his job as advising the assistant road supervisors, and making sure that everything is performed according to proper procedures. Ms. Williamson-Coleman has the same responsibility in the intake department. Mr. Crabtree and Ms. Ginn rely on Ms. Williamson-Coleman to ensure that the intake department is running smoothly and according to proper procedures. No other employees have that responsibility.

Accordingly, the weight of the evidence supports a finding that Ms. Williamson-Coleman is a supervisor under the Act.

VI. CONCLUSION

For the reasons discussed above, the challenges to Ms. Williamson-Coleman and Ms. Lowe's ballots should be sustained, and the Regional Director's Decision and Order on Challenged Ballots should be rejected. Ms. Williamson-Coleman is a supervisor within the definition of the Act, and as such should be excluded from the proposed bargaining unit. Ms. Lowe does not have a community of interest with the proposed bargaining unit, and as such should be excluded from the proposed bargaining unit. Accordingly, the Board should sustain the challenges to Ms. Williamson-Coleman and Ms. Lowe's ballots, not count the ballots, and issue a certification of results.

Dated: May 29, 2020.

Respectfully submitted,

/s/Kathleen A. Carnes

Kathleen A. Carnes
DINSMORE & SHOHL LLP
255 East Fifth Street, Suite 1900
Cincinnati, OH 43202
Phone: (513) 977-8306
Fax: (513) 977-8141
Email: kathleen.carnes@dinsmore.com

and

Jacqueline N. Rau
DINSMORE & SHOHL LLP
191 W. Nationwide Blvd, Suite 300
Columbus, OH 43215
Phone: (614) 628-6883
Fax: (614) 628-6890
Email: jacqueline.rau@dinsmore.com

Counsel for Employer Legal Aid of the Bluegrass, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2020, a copy of Employer Legal Aid of the Bluegrass, Inc.'s Request for Review of the Regional Director's Decision and Order on Challenged Ballots was electronically filed via the NLRB E-Filing system with the National Labor Relations Board and I further certify that a copy was served by e-mail on the following:

Rachel A. Thomas
National Organization of Legal Services Workers/UAW Local 2320
5102 Carmona Lane
Pearland, TX 77502
E-mail: raheast2320@gmail.com

Counsel for the Petitioner National Organization of Legal Services Workers/UAW Local 2320

Patricia K. Nachand, Acting Regional Director
Region 9, National Labor Relations Board
3-111 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
E-mail: patricia.nachand@nlrb.gov

Acting Regional Director

Jonathan Duffey, Hearing Officer
Region 9, National Labor Relations Board
3-111 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
E-mail: jonathan.duffey@nlrb.gov

Hearing Officer

/s/Jacqueline N. Rau
Jacqueline N. Rau

Counsel for Employer Legal Aid of the Bluegrass, Inc.

From: Studer, Timothy C. <Timothy.Studer@nlrb.gov>
Sent: Wednesday, January 22, 2020 3:18 PM
To: Carnes, Kathleen <kathleen.carnes@dinsmore.com>
Subject: RE: 9-RC-254679

You can challenge any person you do not think has the right to vote.

From: Carnes, Kathleen <kathleen.carnes@dinsmore.com>
Sent: Wednesday, January 22, 2020 3:16 PM
To: Studer, Timothy C. <Timothy.Studer@nlrb.gov>
Subject: RE: 9-RC-254679

No motion was filed for postponement. We are able to go on Monday if need be.
I am not sure this will be worked out. They may insist upon a separation of the professional and nonprofessional.

Would we vote the social worker under challenge because we will not agree to including that classification in the unit.

EXHIBIT 1

From: Studer, Timothy C. <Timothy.Studer@nlrb.gov>
Sent: Wednesday, February 5, 2020 11:35 AM
To: Carnes, Kathleen <kathleen.carnes@dinsmore.com>
Subject: RE: LEGAL AID OF THE BLUEGRASS, INC. - 09-RC-254679

I understand that but do you know what that person is classified as?

From: Carnes, Kathleen <kathleen.carnes@dinsmore.com>
Sent: Wednesday, February 5, 2020 11:34 AM
To: Studer, Timothy C. <Timothy.Studer@nlrb.gov>
Subject: RE: LEGAL AID OF THE BLUEGRASS, INC. - 09-RC-254679

We never agreed that individual or that designation was in the voting unit. I believe we agreed to disagree and she can be voted under challenge. There has never been a social worker in the unit.

From: Studer, Timothy C. <Timothy.Studer@nlrb.gov>
Sent: Wednesday, February 5, 2020 11:32 AM
To: Carnes, Kathleen <kathleen.carnes@dinsmore.com>
Subject: RE: LEGAL AID OF THE BLUEGRASS, INC. - 09-RC-254679

Is the Social Worker a professional or non-professional?

From: Carnes, Kathleen <kathleen.carnes@dinsmore.com>
Sent: Wednesday, February 5, 2020 11:11 AM
To: Studer, Timothy C. <Timothy.Studer@nlrb.gov>
Cc: Rau, Jacqueline <Jacqueline.Rau@DINSMORE.COM>
Subject: RE: LEGAL AID OF THE BLUEGRASS, INC. - 09-RC-254679

EXHIBIT 2

From: Studer, Timothy C. <Timothy.Studer@nlrb.gov>
Sent: Wednesday, February 5, 2020 10:34 AM
To: Carnes, Kathleen <kathleen.carnes@dinsmore.com>
Subject: RE: LEGAL AID OF THE BLUEGRASS, INC. - 09-RC-254679

Ms. Carnes,

The ARD would like 2 separate lists submitted. One with Unit A (Professionals) and one with Unit B (non-professionals).

From: Carnes, Kathleen <kathleen.carnes@dinsmore.com>
Sent: Tuesday, February 4, 2020 4:39 PM
To: Garnett, Melissa <Melissa.Garnett@nlrb.gov>; raheast2320@gmail.com; Nachand, Patricia <Patricia.Nachand@nlrb.gov>; Studer, Timothy C. <Timothy.Studer@nlrb.gov>; Denholm, Matthew T. <Matthew.Denholm@nlrb.gov>
Cc: jcrabtree@lablaw.org; Rau, Jacqueline <Jacqueline.Rau@DINSMORE.COM>
Subject: RE: LEGAL AID OF THE BLUEGRASS, INC. - 09-RC-254679

Please find attached Legal Aid of the Bluegrass's Voter list, Certificate of Service , and the Employer's observer designation.

Thank you,

Kathleen Carnes

Dinsmore

Kathleen A. Carnes
Associate Of Counsel

Dinsmore & Shohl LLP • Legal Counsel
255 East Fifth Street
Suite 1900
Cincinnati, OH 45202
T (513) 977-8306 • **F** (513) 977-8141
E kathleen.carnes@dinsmore.com • dinsmore.com

EXHIBIT 2